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The National Treatment Requirements of the Berne and Universal Copyright Conventions [Part 1]

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*David Vaver**

The National Treatment Requirements of the Berne and Universal Copyright Conventions Part One

A. Introduction

States are constantly engaged in the process of revising or amending their copyright laws to cope with the pressures of new technologies and the demands of various classes of persons or entities who wish to acquire new rights over copyright works. Since most states are now parties to either or both the Revised Berne Convention (RBC) and the Universal Copyright Convention (UCC), they are aware that any reform of their laws must comply with the obligations imposed by these Conventions. Currently the United States, which is bound only by the UCC, is considering what changes may be necessary to its law in order that it may accede to the RBC and thus gain the improved international protection provided by the latter Convention.¹ In all such cases, an important preliminary question states must face is: how far are they bound to extend the benefit and protection of their copyright law in favour of other members of either Convention?

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For footnote 1 see next page.

At first sight, the matter seems easily resolved. Like the other great Convention on a cognate subject-matter concluded around the same time as the Berne Convention (BC), the Paris Union for International Protection of Industrial Property,² the fundamental principle of the BC since its inception in 1886 has been that of national treatment, "the complete assimilation of foreigners to nationals, without condition of reciprocity".³ With each BC revision, states have undertaken to provide certain minimum standards of protection in addition to the fundamental requirement of national treatment, but the latter principle has remained constant. The same is true of the UCC, except that the minimum standards of protection are fewer. However, the demands of new technology and new classes of creative people and organizations have caused states to grant or consider granting new rights to new sorts of works not necessarily envisaged by the Conventions.

The question that this study addresses is: what "works" and what "rights" are subject to the RBC and the UCC?

The matter is far from academic. Some countries, typically net exporters of copyright material such as the United States, have no hesitation when enacting a new copyright law in generally extending its benefit for all works and all rights to nationals or domiciliaries of UCC states.⁴ Other countries, typically net importers of copyright material, carefully weigh whether to extend protection to foreign nationals at all, and if so, whether on the basis of formal

1 See "Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention (December 31, 1985)" (henceforth "Preliminary Report"), inviting comments preparatory to the issue of a final report.

2 LADAS, "Patents, Trademarks and Related Rights: National and International Protection" (1975, Harvard U.P.), vol. 1, at 271; BEIER, "One Hundred Years of International Cooperation - The Role of the Paris Convention in the Past, Present and Future" 15 IIC 1, at 9-11 (1984).

3 LADAS, "The International Protection of Literary and Artistic Property" (1938, Macmillan, N.Y.), at 365. See also WIPO, "Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)" (Geneva, 1978), p. 32 ("WIPO Guide") (note that the Guide is merely an explanation, not an authentic interpretation, of the RBC: *id.*, at 4).

4 Copyright Act of 1976, 17 U.S.C. s. 104(b)(1), (2). The Semiconductor Chip Protection Act of 1984, appended as Chapter 9 of the Copyright Act, however rejects this principle in favour of reciprocity (17 U.S.C. s. 902(a)(1), 914). One reason for rejecting national treatment was the fear that U.S. works would not be protected in other countries, and "the interest of the United States in establishing a reasonable system of domestic protection for mask works is paramount": House Report No. 98-781 (98th Cong., 2d Sess., 1984), p. 7.

reciprocity, normally attracting national treatment, or material reciprocity.⁵ That the primary beneficiaries of the rights may well end up being foreigners is never far from their minds.

Not surprisingly, many states are reluctant voluntarily to create a situation where their nationals benefit little or less than foreign nationals. Occasionally, negative forces such as xenophobia steer a state away from according national treatment, but more often considerations of cultural and economic nationalism provide the motivation. States wishing to reinforce their own culture look naturally to extending protection only to their own authors and cultural industries. Moreover, a state that wishes to encourage the growth and improve the economic conditions of its local authors and industries may see no reason why this policy should be extended to foreign nationals. Extending protection to the latter brings with it the possibility of a measure of foreign domination or control and, perhaps more significantly, an outflow of cash. This may affect a state's self-perception of its autonomy, individuality and power, as well as its balance of trade and ultimately its general economic position in an era of almost systemic economic uncertainty.

States that voluntarily extend protection to foreigners may do so professedly because of altruistic reasons, a traditionally strong belief in the notion of authors' rights, or an expansive view of their international obligations. In some instances, one suspects a state makes these gestures more because it perceives that it has little to lose and everything to gain by them. States following this policy are typically net exporters of copyright material; by setting an example, they hope to encourage or be in a position to pressure other states to follow suit. Philosophical romanticism may be the avowed

⁵ See, e.g., Report of the STANDING COMMITTEE ON COMMUNICATIONS AND CULTURE'S SUB-COMMITTEE ON THE REVISION OF COPYRIGHT, "A Charter of Rights for Creators" (1985, Ministry of Supply and Services Canada), pp. 103-112, *passim* (Summary of Recommendations) ("the Charter").

As used here, "formal reciprocity" means that state A will protect state B's nationals and vice versa; the standard of protection is unstated, but the standard of both the RBC and UCC, departed from in only exceptional cases, is national treatment. "Material reciprocity" means that state A grants nationals of state B the same protection as state B grants to state A's nationals; this principle is disfavoured in copyright treaties because of the costs and difficulties in establishing foreign law.

reason for the policy but, in reality, material and economic self-interest are the more powerful propellants.⁶

Despite these political realities, the question of what obligations a state is under to extend national treatment by virtue of the RBC or the UCC is a legal one and will be so considered here.⁷ The broad issues that will be studied are:

- a) What "works" qualify for national treatment? In particular, do sound and video recordings, published editions, performances, broadcasts, and computer programs qualify?
- b) What "rights" must be given national treatment? In particular, do rights such as the *droit de suite*, home taping and public lending rights qualify?

In examining these questions, we shall find a surprising diversity of views existing on both matters of approach and points of detail. The reasons for these differences are no doubt complex. Occasionally, a commentary reads almost like a brief for a particular interest group; when one learns that the writer was at one time employed or retained by a sector of the copyright industry, one sometimes wonders whether the possibility of subconscious bias may exist. Sometimes a commentator fails to appreciate the proper scope of the RBC and the UCC in the light of their history and purpose, and to apply appropriate principles of interpretation to the treaties. It is admittedly difficult entirely to eliminate the preconceptions instilled by one's own national culture, history and legislation when viewing other copyright legislation, even international treaties.

Other commentators seem to give insufficient weight to the fact that the texts of both the RBC and the UCC, while seeking ostensibly to reconcile compet-

6 Thus, the United States is currently placing pressure on a number of countries (principally the Caribbean, the Far East and Canada) by threats of economic and trade retaliation, in an attempt to force these states to adopt U.S.-like copyright laws preventing practices ranging from counterfeiting to picking up television signals from U.S. satellites. A Presidential policy statement issued in April 1986 stated: "The United States provides strong protection for intellectual property rights within our borders for domestic and foreign citizens and businesses. We expect other nations to do the same in the interest of stimulating increased innovation and improving living standards throughout the world." (New York Times, April 7, 1986, p. 21).

7 Both Conventions lay down certain substantive rights that all participating states must extend to foreigners. States failing to provide for these rights will obviously be in breach of the Conventions. This comment deals only with rights not specifically required to be granted by the Conventions, which a State chooses to extend to its nationals.

ing notions of European and Anglo-American concepts of authors' rights and copyright respectively, have generally reflected the former rather than the latter. European notions, emphasizing the need for authors, artists and composers to have continuing control over their works, require intellectual creativity of the sort commonly associated with those classes of works and workers as a precondition to granting protection. The economic rights of the author (to reap profit from uses made of the work) and his/her moral rights (to have the work properly credited, not prejudicially modified, and even recalled where it no longer conforms with the author's views) are the twin pillars of the European edifice. Anglo-American notions, while recognizing the initial importance of the creative classes, are willing to extend protection to other works lacking intellectual creativity so long as they involve an investment of time, labour or money. Economic rights are emphasized; author's moral rights, on the other hand, are generally little regarded. Where they are recognized, moral rights are rarely protected as such; more often, a patchwork of common law or statutory doctrines of unfair competition, passing off or defamation have to be resorted to. In short, European theory emphasizes the author, the importance of his/her contribution to culture, and consequently his/her need for both economic and moral rights; Anglo-American theory stresses the entrepreneur, the importance of his/her role in bringing works to public attention, and consequently the purely economic nature of copyright.

It seems fair to say that the states espousing the European view present at both RBC and UCC Conferences succeeded, through a combination of force of numbers and persuasion, in ensuring that authors' rights notions tended to prevail over copyright concepts in case of conflict. The texts of both the RBC and the UCC reflect this success, a fact that must constantly be kept in mind when the texts are being interpreted.

We shall proceed, first, by briefly setting out the relevant principles of treaty interpretation to be followed. Secondly, we shall analyze in some detail the relevant language in the RBC (Paris 1971) and its prior texts down to Rome 1928.⁸ Thirdly, we shall make a similar analysis of the UCC.

⁸ Thailand is the only country adhering to a prior text (Berlin 1908). The remarks to be made about the Rome 1928 text apply equally to the Berlin 1908 text, which is similar in all aspects relevant to this study.

B. Principles of Interpretation

"To proclaim in 1984 that the law of statutory interpretation is a morass of contradictory rules, presumptions, and practices which litigants and judges can draw on to defend opposite conclusions is merely to repeat the commonplace learning of the day."⁹

What was said to be true in 1984 of domestic principles of statutory interpretation has been thought by some to be just as true of principles of treaty interpretation.¹⁰ As the plethora of dissenting and majority judicial opinions amply attests, the search for some "objective" meaning in a treaty is a task fraught with difficulty. Some have thought that the most that can be done is to "apply considerations of reasonableness and good faith or, in other words, the *jus aequum* rule", which is "necessarily the outcome of a balancing process between conflicting equities."¹¹

The coming into force in 1980 of the Vienna Convention on the Law of Treaties 1969 has sought to bring some semblance of order into treaty interpretation. The Vienna Convention has not been ratified by some countries, but international tribunals and organizations have approved and applied its principles of interpretation appearing in Arts. 31 and 32, even when dealing with pre-Convention treaties, as reflecting either a codification of customary international law or, more plausibly, the current development of appropriate principles of international law. The principles stated in Arts. 31 and 32 are "the comparatively few general principles which appear to constitute general rules for the interpretation of treaties."¹² They are not intended to displace other principles and maxims in international practice that "are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document."¹³

The relevant principles for interpreting the RBC and UCC seem to be the following. Article 31.1 of the Vienna Convention requires a treaty to be

9 TUCKER, "The Gospel of Statutory Rules requiring Liberal Interpretation according to St Peter's" 35 *Uni.Tor. L.J.* 113 (1985).

10 See, e.g., STONE, "Fictional elements in treaty interpretation - A Study in the International Judicial Process" 1 *Syd. L.Rev.* 344 (1955).

11 SCHWARZENBERGER, "A Manual of International Law" (5th ed., 1967), 164.

12 WETZEL & RAUSCHNING (eds.), "The Vienna Convention on the Law of Treaties: Travaux Préparatoires" (1978, Metzner, Frankfurt), pp. 250-251 (Official Commentary on Arts. 31 and 32).

13 *Id.*, at 250.

interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, the starting point must be the text of the Conventions in their context.¹⁴ The preamble to the Conventions and subsequent state practice establishing an understanding of the parties regarding the interpretation of the Conventions are relevant. Where the parties intended terms to have a special meaning, that meaning will be applied.¹⁵

Under Article 32 of the Vienna Convention, "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may be regarded to confirm meaning, or to determine it where the interpretation according to Art. 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". Since differing views have been expressed concerning the clauses of the RBC and UCC to be considered, their meaning must be considered sufficiently ambiguous for *travaux préparatoires* to be used as aids to construction.¹⁶ In any event, Art. 32 does not prevent all relevant material being used to assist the process of interpretation. It simply stresses that supplementary means of interpretation are not "an alternative, autonomous method of interpretation divorced from the general rule". In practice, the circumstances in which a treaty has been concluded and the *travaux préparatoires* are regularly assessed and relied on by international tribunals.¹⁷ We shall find these matters of some use in throwing light on the language used in the RBC and UCC.

Two matters regarding the "ordinary meaning" to be given to the Conventions should be mentioned at this point. First, that meaning cannot be considered in grammatical isolation but only in the context of the whole treaty.¹⁸ The preambles to the Conventions indicate that a construction favouring the

¹⁴ SINCLAIR, "The Vienna Convention on the Law of Treaties" (2nd ed., 1984, Manchester Univ. Press), pp. 117-119. Literalism should bow to an interpretation that effects the treaty's purpose: *Re Regina & Palacios* 7 D.L.R. (4th) 112, at 120-121 (Ontario C.A., 1984).

¹⁵ Vienna Convention, Art. 31.3(b), 31.4.

¹⁶ Domestic British practice now permits this if the *travaux* are accessible to the public and if they clearly point to a definite legislative intention: *Fothergill v. Monarch Airlines Ltd* [1981] A.C. 251, at 278 (H.L.).

¹⁷ SINCLAIR, *supra* note 14, at 116, 141 *et seq.* See SCHONHERR, "On the Interpretation of Article 5(2) of the Berne Convention, Taking as an Example the Greek Antipiracy Law of July 15, 1980", Copyright (1981), 294 at 295.

¹⁸ *Id.*, at 121.

author's protection may generally be preferred,¹⁹ but the context may require apparently sweeping language to be read restrictively.²⁰

Secondly, the RBC provisions to be examined can be traced back to the original BC of 1886 and also influenced the drafting of the UCC. The ordinary meaning of the Conventions and their revisions should be ascertained by reference to linguistic usage current at the time of their conclusion. This proposition is one "both of common sense and good faith" and "implicit in the rule that meaning of terms is to be determined by reference to the context of the treaty and to its objects and purposes".²¹ On the one hand, obligations that the parties never contemplated at the time of concluding the Conventions cannot be imposed on them under the guise of interpretation. On the other hand, the Conventions when concluded were intended to regulate the parties' behaviour for the indefinite future. Accordingly, when the parties dealt with matters that were known to fluctuate with time and taste and which were subject to rapid technological development, they may have deliberately used open-textured language to encompass new developments.

C. Berne Convention

1. Paris 1971 Text: General Principles

Article 5(1) and (2) of RBC (Paris 1971)²² states:

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

19 *Gribble v. Man. Free Press Co. Ltd* [1931] 3 W.W.R. 570, at 571 (Manitoba C.A.).

20 *MacDonald v. Vapor Can. Ltd* [1977] 2 S.C.R. 134, at 176-177 (Can.), interpreting Art. 10^{bis} of the Paris Convention for the Protection of Industrial Property (London 1934 text).

21 WETZEL & RAUSCHNING, *supra* note 12, at 244 (observations of the Special Rapporteur, Sir Humphrey Waldock, on Arts. 31 and 32 of the Vienna Convention); SCHWARZENBERGER, *supra* note 11 ("treaty interpretation aims at the establishment of the true meaning of a treaty at the time when it was concluded"); *Arrow River & Tributaries Slide & Boom Co. Ltd v. Pigeon Timber Co. Ltd* [1932] S.C.R. 495, at 508 (Can.); *Black-Clawson Int'l Ltd v. Papierwerke Waldhof-Aschaffenberg A.G.* [1975] A.C. 591, at 643-644 (H.L.).

22 The RBC (Stockholm 1967) and the RBC (Paris 1971) texts are identical for all purposes relevant to this study. Thus, unless otherwise mentioned, the comments on the 1971 text apply equally to the 1967 text.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

The reference in Article 5(1) to "works for which [authors] are protected under this Convention" refers naturally back to Art. 2(6): "The works mentioned in this Article shall enjoy protection in all countries of the Union." The RBC therefore covers only works that Art. 2 protects; works outside that Article fall outside the RBC.

The works mentioned are primarily "literary and artistic works".²³ Related creative works that, on a purist view, might not fall naturally under that rubric or that might be subject to prior authors' rights (henceforth called "related works") are also specifically mentioned in Art. 2. They comprise derivative works such as translations, adaptations, and arrangements;²⁴ collective works such as encyclopaedias and anthologies;²⁵ optionally, official texts of a legislative, administrative and legal nature;²⁶ optionally, works of applied art and industrial designs and models, but if the last two categories are not given special protection (*e.g.*, under industrial designs legislation), they are protected as artistic works.²⁷

Apart from a special problem of interpretation to be dealt with in a moment arising from the RBC Brussels 1948 text and previous texts, the obligations placed on a RBC member as a result of these provisions may be summarized thus:

- (a) A state must grant foreign RBC "authors" for their protected "works" those "rights" which a state grants now or in the future to its own nationals.
- (b) A foreign author seeking protection in the state for his/her work will have his/her rights determined according to the state's law, whatever

²³ Art. 2(1) defines these as including "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression", and then goes on to provide a non-exhaustive list of examples. These examples, many of which were present in the first BC in 1886, have been progressively revised and expanded in subsequent revisions.

²⁴ Art. 2(3).

²⁵ Art. 2(5).

²⁶ Art. 2(4).

²⁷ Art. 2(7).

protection his/her work enjoys in its country of origin.²⁸ This proposition and the previous one elaborate the principle of assimilation that has been the hallmark of the BC from its inception in 1886: foreign works are assimilated to local works. Courts enforcing copyrights will apply the *lex fori*, not some other law that might otherwise be mandated by the domestic court's principles of conflicts of law.²⁹

- (c) The state must provide those "rights specially granted by this Convention" to foreign authors. Apart from the provisions imposing minimum standards of protection that all states must extend, the precise nature of the works protected and the rights granted are by and large left to a state's legislative discretion. The works included within the RBC and the rights attaching to them, which a state is obliged to protect, have been progressively enlarged since the original BC. Theoretically, the RBC is not supposed to compromise a state's internal affairs, since it does not oblige the state to extend protection for such works to its nationals. As the framers of the RBC well understood, however, in practice the RBC does oblige a state to extend protection to such works, since it is unthinkable that foreign authors should obtain a larger protection in a state than do the state's own nationals.³⁰

2. Brussels 1948 and Previous Texts

The position just outlined applies generally to all versions of the RBC prior to the 1971 Paris text. There is however a problem relating to a change of language in Art. 5(1) of RBC (Paris 1971) from prior texts. That Article specifies that the "works" subject to national treatment are those "for which [authors] are protected under this Convention". This last phrase is missing from the corresponding provision, Art. 4(1), of the Brussels 1948 and Rome 1928 texts. The latter Article simply says that RBC authors shall enjoy national treatment "for their works". Has the Paris text simply made explicit what was implicit in the Brussels and prior texts or, as has sometimes been claimed,³¹ do the latter texts grant protection for a wider range of subject

28 Art. 5(2) states in explicit terms what was implicit in prior texts of the RBC.

29 DESBOIS, "Le Droit d'Auteur en France" (2nd ed., 1966), para. 805. As to the case where state A is asked to enforce a copyright infringement occurring in state B, see ULMER, "Intellectual Property Rights and the Conflict of Laws" (Kluwer, 1978), at pp. 9 *et seq.*

30 BRIGGS, "The Law of International Copyright" (London, 1906), at 293-294; RAESTAD, "La Convention de Berne révisée à Rome 1928" (Paris, 1931), at 43. Similarly, as to the UCC: RINGER & FLACK, "Applicability of the Universal Copyright Convention to Certain Works in the Public Domain in their Country of Origin" 27 Bull. Copr. Soc. 157, at 163 (1980).

31 E.g., DAWID, "Basic Principles of International Copyright" 21 Bull. Copr. Soc. 1, at 7 (1973), both for the RBC and UCC.

matter, namely any "works" whether or not they appear in the definition provisions of Art. 2?

The more plausible view is the former, namely that "works" means "works protected by the Convention". In other words, the RBC Paris text has said explicitly what was always implicit under prior RBC texts. This is supported by a number of considerations.

A minor point is that no change in wording of Brussels Art. 4(1) was initially proposed at Stockholm 1967.³² The change seems to have occurred at some late stage of the proceedings and does not appear to have been debated to any degree. This suggests that the alteration was merely stylistic or clarificatory and not a matter of substance. However, too much cannot be made of this argument since the principle of interpretation, that it is frequently dangerous to construe an earlier statute by reference to the wording of a later one, seems just as valid in the international sphere as it is in the domestic. The parties' intention as revealed by texts concluded in 1928 and 1948 can rarely be revealed by later texts that, by definition, were not then contemplated. Nevertheless, since the history of the RBC has been one of progressively increasing the degree of protection with each revision, it would be surprising if texts prior to Stockholm afforded wider protection than the latter.

The major argument in favour of the proposition that "work" is unqualified involves a literal interpretation of the text. The word has no preceding adjectives; if "literary and artistic work" and related works were meant, why did not the drafters say so? Their silence on this point must be deliberate; they intended any "work", whether or not it fell within the category of works the RBC required to be protected.

This argument however proves too much. The context requires the word "work" to be limited in some way; otherwise, a roast beef meal made by an author would arguably be internationally protected, since it is a "work". The response might be to say that the immediate context of Art. 4(1) imposes the limitation that the "work" must be one produced by an "author" *qua* author, that is, exercising the faculties of an "author"; or that "work" itself implies some intellectual creativity. This would therefore exclude the roast beef meal but still include works that did not necessarily fall within the definition of "literary and artistic" or related works.

³² WIPO, "Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967" (1971, Geneva), vol. 1, at p. 91; vol. 2, at 1136.

However, the words must be read not merely in their immediate context but in the context of the RBC as a whole. Once this occurs, we find a plausible alternative explanation why the phrase "literary and artistic works" was omitted in Art. 4(1), especially if RBC (Rome 1928) is considered. Rome Article 3 requires photographs to be protected but does not categorize them as either literary or artistic works, because BC members before and at Rome disagreed upon whether they could properly be classed as "artistic works" at all. Furthermore, by Rome Art. 14 cinematographic works were assimilated to photographs, rather than literary and artistic works, if "the author has [not] given the work an original character". Thus, had Rome Art. 4(1) referred to "literary and artistic works", related works such as photographs and some cinematographs would have been excluded from national treatment. The unqualified word "work" thus ensured that both literary and artistic works *and* those related works that did not fall within this phrase but which RBC Rome nevertheless required to be protected were in fact protected under Art. 4(1). When photographs and cinematographs were no longer treated as related works and were shifted into the definition of literary and artistic works at Brussels in 1948, the reason for using the unqualified word "work" in Art. 4(1) ceased but no-one apparently thought, quite legitimately, that a consequential change in drafting was required to make explicit what was implicit, namely, that "works" referred to all "works mentioned in this Article [2]" that now "enjoy[ed] protection in all countries of the Union".³³

Moreover, the principle that sweeping words must be read in context³⁴ supports the narrower interpretation. The RBC's preamble makes it clear that the RBC is not concerned with protecting "works", but "literary and artistic works". Rome Article 4(1) follows Arts. 2 and 3,³⁵ which have just defined the works which states are bound to protect. One would thus expect that "the work" and "works" of authors to which Art. 4(1) now refers relates naturally back to the works just mentioned.

It should also be noted that the word "work" appears in an unqualified form in a number of other provisions in RBC (Brussels 1948) and corresponding

33 RBC (Brussels 1948), Art. 2(4). The argument based on the layout of the text of RBC (Rome 1928) is reinforced by the layout of the original BC 1886. Article 2, corresponding to RBC Rome Art. 4, was followed by Art. 4 defining literary and artistic works, and then by Art. 6 which protected translations merely as "original works" without classifying them as literary or artistic.

34 See *supra* note 20.

35 Art. 3 of Rome was omitted in Brussels 1948 consequent on the decision to move the subject-matter of photographs appearing in that Article into the definition of "literary and artistic works" in Art. 2(1).

previous texts, as well as RBC (Paris 1971). These include provisions entitling a state to retaliate against non-RBC states whose nationals publish in an RBC state but who do not adequately protect an RBC national (RBC 1948 Art. 6(2)), as well as provisions prescribing minimum rights such as moral rights (Art. 6^{bis}), the term of protection (Arts. 7 and 7^{bis}), the seizure of infringing works (Art. 16), and the period of commencement of the RBC (Art. 18). Nothing in these provisions suggests that any wider meaning than literary, artistic and related works as defined in the RBC is meant. The domestic principle of interpretation that the same word should *prima facie* bear the same meaning wherever it appears in a text should prevail here equally, reinforcing the view suggested above for Art. 4(1). This conclusion is not weakened because the RBC sometimes uses the phrase "literary and artistic works" in full. This occurs especially when a contrast is sought with provisions applicable to particular works in that category, (e.g., dramatic and musical works (Art. 11), literary works (Art. 11^{ter}), musical works (Art. 13)). That total consistency has not been attained is in any event not unusual in a text that has evolved over a long period of time and been subject to successive drafts and revisions.

The history, object and purpose of the RBC support this narrower interpretation of Art. 4(1). The first BC was concluded just three years after the Paris Union for the International Protection of Industrial Property had been established in 1883. Many states were then and are now members of both Unions. Both Conventions were considered to be dealing with different subject-matter, a distinction sought to be maintained throughout later revisions of both. Literally, a "work" in the BC could refer to matters that fell properly under the heading of "industrial property". Since the obligations imposed on Paris Union members are different, given the subject-matter, from those on BC states, they obviously sought to avoid or minimize the possibility that a "work" might fall under both Conventions.³⁶ The protection of authors' rights was and still is considered distinguishable both phenomenologically and sociologically from other areas of law. As Dietz has pointed out, a phenomenological definition is necessary to hive copyright off vertically from cognate legal areas such as industrial property (patents, trade marks and, perhaps, designs); the former is concerned with creativity, the latter more with knowledge and protecting investment. Sociologically, copyright can be promoted on the rationale of protecting writers, musicians and artists in

³⁶ The possibility that works of applied art could fall under either Convention caused difficulties at most revision Conferences, leading to compromises such as that reflected in RBC (Paris 1971), Art. 2(7): *see generally*, REICHMAN, "Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976" [1983] Duke L.J. 1143, at 1153 *et seq.*

relation to their work.³⁷ This basis is implausible for industrial property; indeed, the different classes of industrial property may each require different rationales for their justification.

One may test the thesis another way. Suppose that, during any of the BC Conferences up to and including Brussels, a participant had moved that the phrase "even though the works are not literary or artistic (or, at Rome, photographs or cinematographs) as defined in this Convention" be inserted after "works" in Art. 4(1): would other members have reacted by saying, "Oh no, that is unnecessary; it already means that"? This seems unlikely given the travail at the 1908 RBC over what works should be specified as literary or artistic under Art. 2, a debate that continued in Rome 1928 and Brussels 1948. A more likely response to the hypothetical question would have been: "No, this is a Conference about literary and artistic works, not about other sorts of works. For other works, we already have the Paris Convention for the Protection of Industrial Property, which is periodically revised. If we want to protect still other things internationally, that is something for further discussion."

It may therefore be concluded that a proper interpretation of "works", as it appears in RBC (Brussels) Art. 4(1) and the corresponding language in previous texts, would limit that term to "literary and artistic works" and the related works that by Art. 2 are required to be protected throughout the Union. In this respect, the position is identical to that now existing under RBC (Paris 1971) Art. 5(1).

3. What Works Fall under the RBC?

Suppose a state chooses to grant copyright protection to an object it calls a literary, artistic or related work: does that work fall under the national treatment requirement of RBC Art. 5(1) or its prior equivalents? In other words, do the definitions of the RBC have their own Convention meaning or may a state define them broadly or narrowly according to its own law?

Older and more modern authorities have taken opposing views on this question. Thus, a Swiss court in 1936 held sound recordings, which were by Swiss law equated with adaptations (a protected category of related works from RBC (Berlin 1908)), should be given national treatment under the RBC.

³⁷ DIETZ, "Copyright Law in the European Community" (1978, Sijthoff & Noordhoff), at 29 *et seq.* Accord: BRIGGS, *supra* note 30, at 274-275.

That adaptations in the RBC sense did not include records was apparently thought irrelevant.³⁸ Similarly, Ricketson has recently claimed that

there is no reason why such things as sound recordings and broadcasts could not be considered "literary and artistic works" under art. 2(1) because they are just as much "intellectual creations" and "productions in the literary, scientific and artistic domain" as are cinematograph films which are also expressly referred to as "original works" under art. 14^{bis}(1). *The protection of these further types of work however is left to each country to do at its discretion.*³⁹ (emphasis added)

The contrary view has been taken by Ostertag⁴⁰ and Ulmer, the latter saying: "The general rule [is] that the concept of those works for which national treatment is demanded, is defined by the Convention".⁴¹ A state that defines works more broadly than required under the RBC is neither obliged nor entitled by the RBC to extend national treatment for those works, nor is it obliged or entitled to claim national treatment for them in another RBC state.

38 LADAS, *supra* note 3, at 266 reaches the same conclusion, relying partly on the Swiss decision. The decision is referred to and criticized in OSTERTAG, "La protection des disques étrangers en Suisse", *Le Droit d'Auteur* (1940) 41. Ladas's work appeared before Ostertag's article and does not assess the latter's argument.

39 RICKETSON, "The Law of Intellectual Property" (1984, Law Book Co., Sydney), para. 14.22. The "WIPO Guide", *supra* note 3, at 13, in saying that "[t]he expression 'literary and artistic works' must be taken as including all works capable of being protected" may support Ricketson: but see criticism of similar language at text *infra* accompanying note 147 *et seq.* At first sight, STEWART seems to hold the same view: "International Copyright and Neighbouring Rights" (1983, Butterworths), para. 5.30 (henceforth STEWART I). After pointing out that one reason why the list of works under Art. 2(1) is non-exhaustive is so that new objects should fall under the general definition as technology progresses, he adds that a second reason "is that in many countries the list of works includes things like recordings or broadcasts, which are not works in other countries". The implication is that such countries would be bound to grant national treatment to such works once they are included within their list of literary and artistic works. However, an earlier piece suggests that Stewart may not have intended this implication: STEWART, "Recent Developments and Future Prospects on the International Level in the Field of Phonograms and Videocassettes", in WIPO, "Current Trends in the Field of Intellectual Property" (Montreux 1971 Conference) 266, at 271 (henceforth "Stewart II").

40 *Supra* note 38, at 42-43.

41 ULMER, "The 'Droit de Suite' in International Copyright Law" 6 IIC 12, at 21 (1975), agreeing with OSTERTAG, *supra* note 38; BRIGGS, *supra* note 30, at 335. STEUP, "The Rule of National Treatment for Foreigners and its Application to new Benefits for Authors" 25 Bull. Cop. Soc. 279, at 281-282 (1977) so concludes when considering the question of "rights" under RBC Art. 5(1) and UCC Art. I; her conclusion applies equally to "works".

The view held by Ostertag and Ulmer seems preferable. It is true, as Ricketson says, that the word "work" is nowhere defined in the RBC, but it is wrong simply to focus on this word. The RBC is not a treaty protecting "works". As its preamble states and as is stressed throughout virtually every Article including Art. 5(1), it is one protecting the rights of *authors* over their literary and artistic works. Like "work", "author" is not defined in the RBC but, as we shall see, it has always had a well-recognized meaning. The definition of work is necessarily limited by the fact that only *authors' literary, artistic and related works* are protected.

We can now turn to elaborate these concepts and consider how they apply to various sorts of disputed works.

I

Since "author" is not defined in the RBC, Stewart has argued that "the law of the state where protection is claimed decides who is an 'author'." He continues:

The reason for this lack of definition is that the national laws of member states differ greatly on this point. French law and many systems derived from French law or influenced by it recognise only physical persons as authors (writers, composers, painters, sculptors etc.). Anglo-Saxon legislations and others influenced by them recognise legal entities, *e.g.* film producers, record producers, broadcasting organisations as authors or original right owners.⁴²

There is however more to the question of "authorship", as Stewart himself later recognizes.⁴³ First, a state cannot be entirely free to decide who is an author. For one thing, the RBC deals with people, not animals: no state can claim that a monkey that daubs is the "author" of a painting. Secondly, authorship implies some relevant causal link between a work and a person involved in it: a state cannot claim to be the author of any work its nationals produce, simply because its nationals are its subjects. Logically, therefore, the meaning of the term "author" must be derived from and regulated by the RBC, not by the meaning an individual state chooses to place on the term; nothing in the RBC suggests otherwise. A state may have some liberty of action in deciding who or what constitutes an "author", but cannot compel another RBC state to accept its idiosyncratic meaning to the extent that it departs from the international law significance of the term in the RBC.⁴⁴

42 STEWART I, *supra* note 39, at p. 101. Similarly, "WIPO Guide", *supra* note 3, at p. 11.

43 *Id.*, para. 7.04 *et seq.*, dealing with neighbouring rights.

44 *Accord*: ULMER, *supra* note 41; OSTERTAG, *supra* note 38.

From the BC's inception, "author" has meant a natural person, not a juristic person such as a corporation. Only natural persons, not corporations, can have a nationality and can create works; only natural persons can exercise moral rights over their works.⁴⁵ These doctrinal difficulties caused vigorous discussions at a number of RBC conferences about whether a photograph could be "authored", or who could properly be called the "author" of a cinematograph film, the various creative people who contributed to the final product or the producer who organized the enterprise.⁴⁶

Authorship and ownership of rights in a work must be distinguished. Normally, authorship implies ownership of rights in the work. This theory must however be accommodated with the case of pseudonymous, anonymous or unknown authors, where a practical need exists for someone, typically the work's publisher, to vindicate rights on the author's behalf. The RBC expressly permits this.⁴⁷ More difficult problems arise where an entity employs or commissions an author: states often allocate ownership to the employer, using legal techniques varying from vesting the copyright initially in the employer to creating an automatic assignment of rights from the author to

45 MANN, "International Corporations and National Law" 42 B.Y.I.L. 145, at 151 (1967); DAWID, *supra* note 31, at 8. The purity of this position was reinforced when a British proposal at RBC Brussels to define "author" as including "assignee or other rights owner" was rejected in favour of a proposal to extend Convention rights to an author "and his successors in title" (RBC 1948, Art. 2(4)); UNION INTERNATIONALE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES, "Documents de la Conférence Réunie à Bruxelles du 5 au 26 juin 1948" (Berne, 1951), at 164-165 (henceforth "Documents"). On the position under RBC (Rome 1928), see RAESTAD, *supra* note 30, at 173-174; LADAS, *supra* note 3, para. 91.

46 It was not until RBC Stockholm 1967 that a compromise was reached on the latter issue. This distinguished between the creative people who were termed "authors" and the producer of the film who was considered a "maker": see, e.g., RBC (Paris 1971), Art. 4(a); 5(c)(i); 14(1); 15(2). For the debate, see WIPO, *supra* note 32, vol. 2, at 887 *et seq.*, 931 *et seq.* The matter was extensively discussed by ULMER, "Opinion on Cinematography and copyright given at the request of the Office of the International Union for the Protection of Literary and Artistic Works" (Berne, 1953) at pp. 4 *et seq.*

47 RBC (Paris 1971) allows (1) a named publisher *prima facie* to be "deemed to represent" the pseudonymous or anonymous author (Art. 15(3), a provision traceable to BC 1886, Art. 11 and later texts); (2) a competent state authority to represent the "unknown author", e.g., in the case of folklore (Art. 15(4)(a)). These are evidentiary presumptions and do not affect the true incidence of authorship or ownership: "WIPO Guide", *supra* note 3, at pp. 93-95; *Hogg v. Toye & Co.* [1935] Ch. 497 (C.A.); *Circle Film Enterprises Inc. v. C.B.C.* 20 D.L.R.(2d) 211 (Can.S.C., 1959).

the employer.⁴⁸ Pressures from industry and reasons of expediency occasionally have caused states to go further and fictionally to define the author's employer, normally a corporation, not merely as owner of the copyright but also as author of the work.⁴⁹ Although functionally equivalent to theories of automatic assignment or initial vesting of copyright in the employer, the latter technique seems inconsistent with RBC's basic principles and spirit, especially if heed is not paid to the author's moral rights.

"Author" in the RBC implies a person who applies his/her personal creativity to produce a literary or artistic work. As will be shown below, performers, sound recorders, broadcasters and the like are neither "authors" nor do they create "literary and artistic works". Performers, however creative, only present a performance of a work; broadcasters do no better. Sound recorders at best record the performance of a work, or at worst record an event in nature. In either case, their work, however skilled, is essentially mechanical rather than creative.⁵⁰

48 PLAISANT, "The Employee-Author and Literary and Artistic Property", Copyright (1977) 274; COHEN JEHOAM, "The Author's Place in Society and Legal Relations between Authors and those Responsible for Distributing their Works", Copyright (1978) 385, at 391-393; CUVILLIER, "Employment and Copyright", Copyright (1979) 112. *See generally*, ULMER, *supra* note 29, at pp. 36-39. To speak of the employer as having "derivative authorship" (*cf.* LIMPERG, "Employees' Rights in their Capacity of Author", Copyright (1980), 293, at 294) merely confuses authorship with ownership.

49 *See* authorities in previous note. This has led to the assertion that the U.S. "work for hire" doctrine, under which the hirer is considered the author, is compatible with the RBC. "Preliminary Report", *supra* note 1, ch. 14, p. 4 *et seq.*; *sed quaere*: *see* LIMPERG, previous note, at 298-299.

50 *See text infra*, accompanying notes 61 *et seq.* The doctrinal arguments are of course overdrawn. Performers and sound and film technicians are often as creative in their métier as authors. Doctrinal fundamentalism expresses a different reality. The political and economic reasons why individual authors need rights over their works differ from those that organizations, typically the entities producing movies, broadcasts and records, can proffer for protection. Modigliani and Van Gogh present more pressing cases for kindly solicitude than does the British Broadcasting Corporation or Twentieth Century Fox. Composers also feared that the grant of author's status to performers would result in the formers' income being diminished: a pie can only be divided a finite number of times. These truths can conveniently be obscured so long as resort to high principle is successful. *See generally*, BODENHAUSEN, "Protection of 'Neighboring Rights'" 19 *Law & Contemp. Probs.* 156 (1954); WIPO, "Guide to the Rome Convention and to the Phonograms Convention" (1981), pp. 7-18; MILLE, "Performers' Rights: A New Independent Institution of Intellectual Property Law", Copyright (1984), 289.

II

The word "work" is undefined, so it has been said that "the law of the state where protection is claimed decides what is a 'work'."⁵¹ This is true to some extent; a state can require fixation or some degree of intellectual creation before an object can qualify as a "work".⁵² But the same reasons that dictate "authorship" to be a term bounded by the RBC apply equally to "work". This point is not of central significance since, as has been argued above, "work" in RBC (Paris 1971) Art. 5(1) and its predecessors means those "literary and artistic works" and related works mentioned in the RBC as enjoying protection. The question now is: what works come under this umbrella?

III

RBC (Paris) Article 2(1) gives a non-exhaustive list of "literary and artistic works" that members are bound to protect.⁵³ The list is deliberately open-ended to include new technologies, but it does not follow that anything a state chooses to classify as a "literary" or "artistic" work falls under the RBC. Klaver's comment that states "are entirely free to interpret at their discretion" the term "literary and artistic work"⁵⁴ cannot be accepted literally. A state cannot include in the term something that does not belong there, any more than it can exclude something that obviously does. The language of Art. 2(1) is broad but bounded.

The RBC itself recognizes this. In the Rome 1928 and previous texts, photographs and works produced by a process analogous to photography were dealt with separately from literary and artistic works, obviously because they might not otherwise fall within the definition; similarly, special protection was made for cinematograph productions. True, at Brussels 1948 photographs and cinematographs were added to the non-exhaustive list of examples of "literary and artistic works"; this simply signifies that, in light of the evolution of those media and an overwhelming international consensus, some BC members finally suppressed their objections or sufficiently over-

⁵¹ STEWART I, *supra* note 38, para. 5.30.

⁵² *Id.*; see also "WIPO Guide", *supra* note 3, at 17. The requirement of intellectual creativity may flow equally from the concept of authorship, or may be inherent in the adjectives that qualify "work", i.e., "literary" or "artistic": see "Documents", *supra* note 45, at 94 ("Rapport général"), 154-155. See also DAWID, *supra* note 31, at 7.

⁵³ Art. 2(6). Corresponding provisions appear in prior versions of the RBC.

⁵⁴ KLAVER, "The Legal Problems of Video-Cassettes and Audio-Visual Discs" 23 Bull. Cop. Soc. 152, at 159 (1976).

came their doctrinal difficulties to recognize the creative, rather than merely mechanical, character of much of those works.⁵⁵ It does not suggest that the meaning of "literary and artistic work" has somehow consequentially changed. If one amends a definition section that says "dogs include cats and mice" by adding "sheep" to the list, this provides no warrant for arguing that cattle or any other quadruped is also included because, though not a dog, it shares many of the characteristics of the examples.

Thus, a state may choose to call a tree planted by a gardener an "artistic" work under its copyright law, but it does not follow that this qualifies as an "artistic" or any other form of "work" under Art. 2(1); nor that the gardener is an "author" in terms of Art. 5(1), a term that connotes intellectual creativity of a particular kind; nor, accordingly, that the state is bound to extend national treatment under Art. 5(1). If a state chooses to include within its definition of "work of architecture" a work of landscape architecture,⁵⁶ the work would not be subject to national treatment under Art. 5(1) unless landscape architecture fell within either the general concept of a "literary and artistic work" or the specific example of a "work of architecture" in accord with the meaning of those words in the RBC. A state might, for its own reasons, voluntarily extend national treatment, but this is another matter. The language of the RBC must have a shared common core of meaning that every member would in good faith recognize as placing an obligation on it. Material falling outside that shared common core cannot be part of the RBC obligations. Formal reciprocity is the logic of the RBC: a state protects foreign works precisely because it expects that same class of works by its nationals to be protected by other RBC states. It cannot reasonably expect works outside the ambit of the RBC to be granted foreign protection: that is outside the *quid pro quo* of the compact.⁵⁷

55 Germany, one of the states traditionally favouring total exclusion of cinematographs and photographs from the category of literary and artistic works, did not press this point at Brussels 1948, since it had merely observer status and was represented by a member of the British delegation: "Documents", *supra* note 45, at pp. 54n., 60; the latter did not share German doctrinal concerns on this score. States nonetheless remain free to exclude from protection cinematographs and photographs that lack the personal or intellectual creativity inherent in the concept of an "artistic work": *Id.*, at 140, 155-156; 94 ("Rapport général").

56 See, e.g., the expanded definition of "architectural work" under the Copyright Act 1911 (U.K.), which was held to include such a work: *Vincent v. Universal Housing Co. Ltd* [1928-1935] Macg. Cop. Cas. 275, at 279 (Ch., 1931).

57 OSTERTAG, *supra* note 38, at 42; *Cuisenaire v. South West Imports Ltd* [1968] 2 Ex. C.R. 493, at 511 (aff'd without reference to this point [1969] S.C.R. 208) on the definition section in the Canadian Copyright Act 1921, as amended to implement RBC (Rome 1928) Art. 2(1): "it is still necessary to find that the work in which copyright is claimed is an 'original literary, dramatic, musical or artistic work' in the normal meaning of those words and in the light of the definitions in section 2 of the Act." Cf. LADAS, *supra* note 3, at 213.

IV

There is of course a difficulty with a dynamic definition of "literary and artistic work" designed to encompass new developments as they arise: how does one know when and if a new type of work falls under Art. 2(1)?

Computer software, to be discussed below, is a case in point. Software has been around for some years, yet it is unclear whether, on the present assumption that it is a literary work under the RBC, the laws of some states protect it as such. The jurisprudence may be unsettled or a final decision of the state's highest court may be lacking. States may be reluctant to amend their copyright law to include software until their tribunals have spoken and until the practice of other states has crystallized. If a state's jurisprudence finally holds software to be outside the copyright law, will the state have broken its RBC obligations from the time the new work appeared, since *ex hypothesi* it was unprotected from that moment?

The RBC does not address this issue. It would however be absurd and unreasonable, and thus contrary to the object of the RBC, if a state were treated as breaking its obligation to protect a new class of literary or artistic work from the moment that new class arose. In practice there is always a period of uncertainty as the various participants in a state's legal system – lawyers, courts, bureaucrats, interested parties, and the public – become aware of and start wrestling with the problem. The period may be long or short, depending on a country's state of development and the accidents of litigation. Legal and judicial opinions may initially conflict and some time may elapse before a final solution is reached.

If the work is eventually held to fall outside the state's copyright law, the state should have some time to reach a good faith conclusion on whether its tribunal's decision is correct in terms of the RBC. If it concludes the decision is incorrect, it should be permitted a further reasonable time, measured by the exigencies of its political system, to try in good faith to rectify the position by amending its law. Only if a state acts in bad faith or delays beyond a reasonable time in aligning its law with the RBC, should it then be held to have broken its international obligations.

Obviously this view contains some uncertainties, but the only alternatives – holding a state to be in breach immediately a new class of work arises or imposing a fixed time schedule for it to embrace the new class within its copyright law – are unacceptable as a matter of treaty interpretation or, for that matter, good sense. The suggested view has the virtues of according with the way in which states actually behave, and of fairly balancing state autonomy with the problems inherent in administering a dynamic international obligation.

V

We are now in a position to examine a number of works to determine how far they fall under the RBC.

(a) Sound Recordings and Broadcasts

It has been suggested that sound recordings and broadcasts can qualify as "literary and artistic works" under RBC (Paris 1971) Art. 2(1).⁵⁸ This seems incorrect at least for records. Many RBC states are also members of the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961. Article 16(a)(iv) of this Convention allows a state to opt out of the national treatment requirement for sound recordings and instead apply a rule of material reciprocity. This would be inconsistent with the RBC requirement of national treatment if records were works protected under the RBC. Since Article 1 of the 1961 Convention states that its provisions should not be interpreted as prejudicing protection under the RBC, it follows that records could not in 1961 have been considered protected under the RBC (Brussels 1948), nor can they be so considered under RBC (Paris 1971).

More general matters support the view that not only sound recordings but also broadcasts are outside the RBC. Photographs, cinematographs and analogous works historically were excluded from the definition of "literary and artistic works" right up to RBC Rome 1928. Records and broadcasts could have fared no better. It was easier to recognize that recording and broadcasting should be included in the rights granted to a work, as was indeed done at Rome in 1928, than to recognize that the process of recording or broadcasting was itself "literary" or "artistic".⁵⁹ True, by RBC Brussels 1948 these doctrinal objections concerning cinematographs and photographs had been sufficiently overcome to allow these works to be included within the definition of "literary and artistic works" in Art. 2(1) of that text. Similarly, at Stockholm 1967 an amendment assimilating "works expressed by a process analogous to cinematography" to cinematographic works was added to Art. 2(1) to encompass television broadcasts; Art. 2(2), giving states a discretion whether or not to require fixation in material form as a condition of protection, permits live telecasts to qualify under Art. 2(1).⁶⁰ Careful

58 RICKETSON, *supra* note 39. The "Preliminary Report", *supra* note 1 (ch. 7, p. 3) states that "[t]here is a debate whether sound recordings are covered by separate conventions and therefore not subject to Berne."

59 Moves to include "radiophonic works" in Art. 2 and to grant protection to records as "original works" in Art. 13 were defeated at Rome: LADAS, *supra* note 3, paras. 110, 198.

changes such as these, adopted only after long debate, cannot be used to "bootstrap" other classes of work into Art. 2(1) by spurious analogy.

This conclusion is supported by the *travaux préparatoires* of RBC Brussels 1948. At that Conference, L'Association Littéraire et Artistique Internationale (ALAI) asked the International Bureau to recommend to the Conference that phonograms and broadcast works be added to the list of matters enumerated in Art. 2(1). In their joint report to the Conference, the Bureau and Belgium refused to make this recommendation, not because these matters were already within the broad language of the Article, but because they were not and should not be. As for phonograms, the Report stated that these items were not produced by human intelligence and do not engage the creative activity that legislation dealing with authors' rights protects. This was not literary or artistic but industrial work: it certainly deserves protection but under a different regime. As for broadcast works, the danger was that the work would be commissioned by a broadcast organization which would mistakenly be thought to be the author. In short, both a human "author" and also the intellectual creativity implicit in a literary or artistic work were required before items could fall under the RBC.⁶¹ No participant at Brussels dissented from this view. On this point, the Continental notion of "author's right", which recognizes the special social and legal position of the author,⁶²

60 WIPO, *supra* note 32, vol. 2, at pp. 1177-1178, 1153 ("Rapporteur's Report"). A proposal simply to add "televisual works" to Art. 2(1) failed: *id.*, 863 *et seq.*, 891.

Telefilms may be protected under RBC Brussels as works analogous to cinematographs: DUBIN, "Motion Picture Rights: United States and International" 28 So. Cal. L.R. 205, at 211 (1955); ULMER, *supra* note 46, at 4 ("[w]hether telefilms are true films or analogous productions may remain an open question"). The experts at RBC Stockholm 1967 were not so sure on the point and thus recommended amendments to the text specifically to include telefilms: WIPO, *supra* note 32, vol. 1, at 85-86.

61 "Documents", *supra* note 45, at 140-141, 154-155; *see also* note 59, *supra*. Similarly, at RBC (Berlin 1908), the protection claimed by sound recording and piano roll manufacturers was considered to be in the realm of "droit industriel" rather than of literary and artistic works: "il ne pouvait dès lors être introduit des dispositions à cet égard dans la présente Convention": "Procès-verbaux" contained in "Correspondence Respecting the Revised Convention of Berne for the Protection of Literary and Artistic Works, signed at Berlin, November 13, 1908", Cd. 4467 (1909, London), at p. 106 (declaration of Belgian delegation); *see also* "Minutes of Evidence taken before the Law of Copyright Committee", Cd. 5051 (1909, London), at pp. 128, 130-131 (evidence of Georges Maillard, President of ALAI).

62 The position in France is typical: "[n]o doubt, an inexperienced or unknowledgeable sound engineer will reach a quite different result from an expert and highly qualified specialist; but the act of recording itself is a mechanical, automatic operation, whereas the pen, like the [violinist's] bow, sits lifeless without human hand, or rambles under the control of a child or madman." DESBOIS, *supra* note 29, para. 187 (the identical paragraph appears in the 3rd ed. (1978)) [my translation]. *See also* ROSEN, "Artists' Moral Rights: A European Evolution, an American Revolution" 2 Cardozo Arts & Ent. L.J. 155 (1983).

prevailed over the pragmatic British notion of "copyright".⁶³ Not until the 1961 Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations did broadcasters and record producers obtain protection, and then only under the guise of "*droits voisins*" ("neighbouring rights") to authors' rights.⁶⁴

The view that records and broadcasts are outside the RBC is supported by British,⁶⁵ Australian,⁶⁶ New Zealand⁶⁷ and Canadian⁶⁸ committees consider-

- 63 See text *supra* accompanying notes 7-8. Assertions that no philosophical differences exist between Continental and British notions of copyright (e.g., RECHT, "Le Droit d'Auteur, une nouvelle forme de propriété" (1969, Paris), 19-20) conveniently ignore the case of sound recordings. Thus, unlike many Continental countries and despite evidence that such works were not literary or artistic works under RBC (Berlin 1908) (see "Minutes of Evidence", *supra* note 61), Britain had no qualms in assimilating sound recordings to musical works: Copyright Act 1911 (U.K.), s. 19(1); a course followed by other British Commonwealth countries, e.g., Canada (Copyright Act 1924, now R.S.C. 1970, c. C-30, s. 4(3)).
- 64 Moreover, Art. 1 of the 1961 Rome Convention states that the protection under the Convention "shall leave intact and shall in no way affect the protection of copyright in literary and artistic works", thereby clearly making a distinction between the subject-matter of the present Convention and "literary and artistic works". The discussion on this Article at the Conference emphasizes the distinction between an author and the performer of a work, who is not regarded as an author: ILO/UNESCO/BIRPI, "Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961" (Belgium, 1968), at 79-81. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971) also distinguishes between "authors" and "performers and producers of phonograms": see preamble and Art. 7; also UNESCO/WIPO, "Records of the International Conference of States on the Protection of Phonograms" (Paris, Geneva, 1975), at p. 37 (para. 24 of "General Rapporteur's Report").
- 65 "Report of the Committee to consider the Law on Copyright and Designs" (the "Whitford Report"), Cmnd. 6732 (1977), para. 44.
- 66 "Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable in the Copyright Law of the Commonwealth" (the "Spicer Report"), (Govt. Printer, Canberra, 1959), para. 285.
- 67 "Report of the Copyright Committee" (the "Dalglish Report"), (Govt. Printer, Wellington, 1959), paras. 73, 280.
- 68 ROYAL COMMISSION ON PATENTS, COPYRIGHT, TRADE MARKS AND INDUSTRIAL DESIGNS, "Report on Copyright" (1957, Ottawa) ("the ILSLEY Report"), at 76; KEYES & BRUNET, "Copyright in Canada: Proposals for a Revision of the Law" (1977, Consumer & Corporate Affairs Canada), at 21; CONSUMER & CORPORATE AFFAIRS CANADA/DEPARTMENT OF COMMUNICATIONS, "From Gutenberg to Telidon: A White Paper on Copyright" (1984), at 4 (broadcasts); "The Charter", *supra* note 5, at 50-51 (sound recordings), 58-59 (broadcasts).

ing revision of their copyright laws. It is also supported by most commentators⁶⁹ and seems plainly right.

(b) Videograms

Videograms (i.e., video-tapes and discs) may qualify as photographs or cinematographs; alternatively, as works "produced" (Rome 1928, Brussels 1948) or "expressed" (Paris 1971) by a process "analogous to" photography or cinematography. Commentators claim, correctly,⁷⁰ that this would be a "reasonable interpretation" of the RBC.⁷¹

(c) Performers' Rights

Performers were not regarded as "authors" at the RBC (Rome 1928 and Brussels 1948) Conferences. Performers' rights were debated but not made the subject of a Convention provision: only to a *voeu* requesting members to study the possibility of protecting them.⁷² Performers might well be considered artists, but they only interpreted an existing work and did not create a new one. Protection they might deserve, but not as "authors".

69 "WIPO Guide", *supra* note 3, at p. 17; MAK, "Rights Affecting the Manufacture and Use of Gramophone Records" (Martinus Nijhoff, 1952), at 148; LADAS, *supra* note 3, at 425; OSTERTAG, *supra* note 38, at 41; ULMER, *supra* note 41, at 21 ("this is undisputed today") (but see text *infra* accompanying notes 120 *et seq.*); KLAVER, *supra* note 54, at 164 (phonograms), 165 (broadcasts); DAVIES, "Piracy of Phonograms" (1981, ESC Publishing, Oxford), para. 5.5.2; BUCK, "Copyright, Harmonization & Revision: 'International Conventions on Copyright Law'" 9 Int. Bus. Lawyer 475 (1981); NESGOS, "Canadian Copyright Law and Satellite Transmissions" 20 Osgoode Hall L.J. 232, at 236 (1982) (broadcasts); "Nimmer on Copyright" (1985, Matthew Bender), para. 17.06[A] (sound recordings); STRASCHNOV, "Le Droit d'Auteur et les Droits connexes en Radiodiffusion" (1948, Brussels), 61-62 (sound recordings); STRASCHNOV, "Protection internationale des 'droits voisins'" (1958, Brussels), 37.

70 The Rome 1928 formula is adopted in the Canadian Copyright Act 1924, but commentators have suggested that a Canadian court might not hold videograms covered under the Act: PERRY, "Copyright in Motion Pictures and Mechanical Contrivances" 5 C.P.R.(2d) 256, at 266 *et seq.* (1972); KEYES & BRUNET, *supra* note 68, at 82. A dramatic work embodied on videotape has however been protected: *Tom Hopkins Int'l Inc. v. Wall & Redekop Realty Ltd* [1984] 5 W.W.R. 555, *aff'd* on this point 20 D.L.R.(4th) 407 (Brit. Col. C.A., 1985).

71 GLOVER, "Emerging International Copyright Laws on Off-the-Air Home and Educational Video-Recording: An Analysis" 28 Bull. Cop. Soc. 475, at 483-484 (1981); KLAVER, *supra* note 54 (but see comments in text *supra* accompanying this note); STEWART II, *supra* note 39, at 278.

72 RAESTAD, *supra* note 30, at 242-245 (RBC Rome); "Documents", *supra* note 45, at 308-313, 428 (RBC Brussels).

It was not until the 1961 Rome Convention⁷³ that performers, along with broadcasters and record producers, were granted protection, but then only "neighbouring rights", not authors' rights. British, Australian and Canadian copyright committee reports⁷⁴ and most commentators⁷⁵ correctly consider that performers have no rights under the RBC.

(d) Published Editions

Publishing a new edition of an existing work is not an act of "authorship", any more than is the recording of a piece of music; there is no creativity in arranging or laying out an existing work.⁷⁶ The edition is therefore not subject to the national treatment requirements of Art. 5(1) of the RBC.⁷⁷

(e) Computer Programs

[A]lthough many agree that the Berne Convention definition [in RBC (Paris 1971) Article 2(1)] *could* fairly naturally be applied to programs, it is hard to make a legal case that it clearly *must* apply, as it was drafted at a time when no one was thinking about computer programs, much less about the possibility that they might require some special treatment.⁷⁸

73 See text *supra* following note 58; also notes 50 and 64. ULMER, *supra* note 46, at p. 9, noting that performers would necessarily have less extensive rights than true authors, gives a practical reason for excluding the former from the RBC: "The high level of copyright protection which has been achieved nationally and internationally in the Countries parties to the Berne Convention can be maintained only if the circle of authors is kept within certain limits."

74 "Whitford Report", *supra* note 65; "Spicer Report", *supra* note 66; KEYES & BRUNET, *supra* note 68, at 82; "The Charter", *supra* note 5, at 56-57.

75 OSTERTAG, *supra* note 38, at 43; PINNER (ed.), "World Copyright" (1953, Leyden), vol. 1, at 1050 (Mentha); MAK, *supra* note 69, at 109; KLAVER, *supra* note 54, at 162 ("more or less universally-held opinion"); ULMER, *supra* note 41, at 21-22 (semble); BUCK, *supra* note 69. Cf. LADAS, *supra* note 3, at para. 199.

76 LADAS, *supra* note 3, at 425; STRASCHNOV, "Protection internationale", *supra* note 69, at 37; MAK, *supra* note 69, at 148 ("surely, nobody would rank as an author [the printer of a book!]").

77 "The Charter", *supra* note 5, at 16.

78 KARJALA, "Lessons from the Computer Software Protection Debate in Japan" 53 *Ariz.St.L.J.* 53, at 78, n. 55 (1984) (emphasis in text); also KARNELL, "Copyright in Computer Programs - An International Survey" [1985] *E.I.P.R.* 126, at 128 (the RBC does not "demand protection for computer programs"). Similarly, "The Charter", *supra* note 5, at p. 45 referred to the "unclear status of computer programs internationally" and recommended a regime of protection based on reciprocity; but note that Canadian courts have recognized programs as literary works under the current 1924 Canadian Act: see note 96, *infra*.

This recent comment is typical of the differing views currently held on the status of computer programs under the RBC.⁷⁹ To some extent, despite its contrary protestations, the World Intellectual Property Organization (WIPO) itself may have unintentionally contributed to the confusion by preparing its 1978 Model Provisions on the Protection of Computer Software.⁸⁰ By suggesting norms such as a shorter term of protection different from those under the RBC, the Model Provisions might be read as implicitly admitting that the RBC does not apply to programs. Subsequently, experts representing both RBC and UCC states and meeting under the aegis of WIPO, after some indecision, cautiously accepted that the RBC may, not must, apply to programs.⁸¹

A computer program is initially written by a human programmer, initially perhaps using flow charts (drawings),⁸² but eventually as a series of instructions (source code) to be inserted into a computer. The computer transforms the source code into machine code, a corresponding series of electric impulses that may interact with an existing program or with the computer's central processing unit to achieve a desired result. Either before, but most

79 FLAMÉE, "Aspects actuels de la protection juridique du logiciel au regard du droit belge" 75 *Rev. de Droit Int. L'Ing. Cons.* 313, at 325-334 (1985). Those favouring protection include BRETT & PERRY (eds.), "The Legal Protection of Software" (ESC, Oxford, 1981), at 93 *et seq.* (Le Stanc); KINDERMANN, "Computer Software and Copyright Conventions" [1981] *E.I.P.R.* 6; GOTZEN, "Les Programmes d'Ordinateurs Comme Objet de Droits Intellectuels" 71 *Rev. de Droit Int. L'Ing. Cons.* 241, at 245-247 (1981); BISHOP, "Legal Protection of Computer Programs in the United Kingdom" 5 *Nw. Jo. Int. Law & Bus.* 269, at 272 (1983); KEPLINGER, "Authorship in the Information Age - Protection for Computer Programs under the Berne and Universal Copyright Conventions", *Copyright* (1985), 119, at 126-128.

80 The provisions are set out in PERRY, "The Legal Protection of Computer Software - The WIPO Model Provisions" [1979] *E.I.P.R.* 34, at 36-37.

81 See BRAUBACH, "Computer Software International Protection" [1980] *E.I.P.R.* 225. The Report of the WIPO International Bureau to the First Session of this meeting states of the RBC position: "it seems to be generally accepted that computer software could enjoy copyright protection, provided that the conditions of copyright law are fulfilled" (Doc. LPCS/I/2, Nov. 30, 1979, para. 8). The Report adopted by the Expert Group is just as cautious: "despite the fact that the existing international convention[s] were not specifically designed to grant protection to computer software, an attempt should nevertheless be made to rely on those conventions as much as possible to avoid the need to prepare a new treaty, whose objectives were covered - at least partly - by existing conventions, particularly the Berne Convention." (Doc. LPCS/I/4, para. 42, Nov. 30, 1979). Similarly, the 1983 WIPO meeting: see Note, "WIPO: Legal Protection of Computer Software" 17 *Jo. World Trade Law* 537, at 538-539 (1983).

82 The following discussion does not deal specifically with flow-charts, which should have no difficulty being protected as "artistic works" (drawings) under the RBC. With this change, the discussion of source and object code applies equally to such drawings.

likely after, the machine code is generated, it can be represented by an object code, a binary or hexadecimal form of the source code understandable by a programmer.⁸³ The machine code may be embedded or stored either temporarily or permanently in a material support such as silicon chip, magnetic tape or disc. It is imperceptible and unintelligible to humans, though it may be physically represented and printed out in its corresponding object code.

Source and object code should qualify as protected works under the RBC. Under RBC (Paris 1971) Art. 2(1), "literary and artistic works" include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". If the code qualifies as a "literary work", it is irrelevant that its expression is in alphanumeric, hexadecimal or binary notation: the code is a "production" and the RBC expressly makes the "mode or form" of the work's "expression" irrelevant. The key question is whether it is a "literary work" by an "author".

The work seems to be created by an "author" in the traditional sense: personal intellectual creativity of an order far greater than many other protected works (letters, simple drawings, photographs) is required to produce a program.⁸⁴ Its form is literary: the notation of source and object codes is visually perceptible and readily comprehensible by other programmers versed in the language. That the codes may lack aesthetic appeal is irrelevant: so do many technical drawings, letters and plastic works of geography, topography or science that, as specific examples of protected works dating from the original BC 1886, undoubtedly qualify for protection. The purpose for which the work is eventually intended, to drive or interact with a machine, should not disqualify the work; as the examples of technical drawings and plastic works indicate, the function or purpose to which a work is put or intended seems irrelevant under the RBC.⁸⁵

83 A human may transform source code to object code, but the availability of assembly programs designed to do this mechanically make this an unlikely event because of its cost inefficiency and practical uselessness. Whether the translation involves the creative act of an "author" is irrelevant, since the originality involved in creating the source code should equally support the object code.

84 Despite a 1985 German decision anomalously requiring something akin to novelty in the patent sense rather than originality for a computer program to qualify as a copyright work: SCHROEDER, "Copyright in Computer Programs - Recent Developments in the Federal Republic of Germany" [1986] E.I.P.R. 88. at 89-90.

85 "WIPO Guide", *supra* note 3, at 13; ULMER & KOLLE, "Copyright Protection of Computer Programs" 14 IIC 159, at 170-171 (1983); *George Hensher Ltd v. Restawile Upholstery (Lancs.) Ltd* [1975] R.P.C. 21, at 68-69 (H.L.); *Cuisenaire v. South West Imports Ltd*, *supra* note 57, at 506.

Some source codes published in computer magazines may have been produced as an intellectual exercise, without the programmer intending personally to use them. A subjective inquiry into the programmer's intent should not be a prerequisite to eligibility for copyright.

Machine code however presents a problem. It may be embodied in a silicon chip that has been preceded by making a number of circuit diagrams, that are then etched and layered as "computer masks" into a chip. The diagrams may qualify as artistic works⁸⁶ but, in this form or as computer masks, will probably fall within the sub-category of works of applied art. Applied art, always a problem area under the RBC,⁸⁷ is not subject to mandatory protection at least if it does not, as diagrams or chips probably do not, comprise industrial designs or models: RBC (Paris 1971) Art. 2(7) gives states a discretion as to how far their law should protect such items. If the item is protected as an applied artistic work, RBC (Paris) Art. 7(4) (but not any version of the RBC up to and including Brussels 1948) requires a minimum of 25 years protection.

Machine code that is embedded or stored either permanently or temporarily on a fixed support but that is not itself preceded by any other work other than source and object code presents a more major problem. Is machine code a "literary work" or a "production in the literary [or] scientific domain"?⁸⁸ This language seemingly implies that a work must comprise humanly perceptible and intelligible symbols, which electric impulses decidedly are not.⁸⁹ Even if this objection is not fatal, the process of converting source or object code into machine code does not involve "authorship" and is less "literary" or "scientific" work than the process of sound recording which, for the purposes of the RBC, belongs to the mechanical rather than creative arts.⁹⁰ Ulmer and Kolle seek to overcome this difficulty by regarding the process of program creation as a composite whole. They then compare it with the process of film-making, showing how the assembly of many creative inputs produces a final product

86 HART, "Legally Protecting Semiconductor Chips in the United Kingdom" [1985] E.I.P.R. 258, 261. Cf. "Preliminary Report", *supra* note 1, ch. 13, at pp. 6-8 (n.).

87 Text *supra* accompanying note 36.

88 A Canadian court has so held in an interlocutory decision dealing with this precise language embodied in s. 2 of the Canadian Copyright Act R.S.C. 1970, c. C-30, taken directly from the equivalent language of Art. 2 of the RBC (Rome 1928): *La Société d'Informatique R.D.G. Inc. v. Dynabec Ltée* [1984] C.S. 1189, *aff'd* 6 C.P.R. (3d) 322 (Que. C. A., 1985).

89 This objection recently prevailed before a 3:2 majority of the High Court of Australia, which held that machine code embodied in a chip did not qualify as a "literary work" under the domestic copyright law: *Computer Edge Pty. Ltd v. Apple Computer Inc.* (May 6, 1986); but see now *infra* note 96. In a companion case in Canada, a trial court did not accept that these objections prevented machine code from being a translation or reproduction in material form of source or object code: *Apple Computer Inc. v. Mackintosh Computers Ltd* (April 29, 1986, Fed. Ct.). The cases were decided virtually contemporaneously without reference to one another; indeed, the Canadian court partly relied on the intermediate Australian appellate decision (53 A.L.R. 225 (1984)) reversed by the Australian High Court.

90 Text *supra* accompanying notes 58 *et seq.*

perhaps more creative than the sum of its parts.⁹¹ The analogy, true on the issue of creativity, is false on the question of other elements of protectability: a cinematographic film is a protected category of work, whereas the very question with machine code is whether it is protectible and, if so, as what sort of work. As the case of sound recordings again demonstrates, it is perfectly possible for copyright works (e.g., music and lyrics) to be used in the creation of an ultimately non-copyright work, where the latter (the recording) does not qualify as the literary or artistic work of an author.⁹² Even if, unusually, the sound recorder is the same person as the music composer and lyricist, and the music and lyrics have been composed specifically for the purpose of being recorded, this does not change the nature of the act of recording and render it a protected work.

There seems equal difficulty in considering machine code a translation, adaptation, alteration or reproduction in any manner or form⁹³ of source or object code: the requirement of humanly perceptible and intelligible symbols would seem to apply to the derivative work as well as the original work. Again, the same reasons as prevent a sound recording being a translation or other derivation from the underlying musical work under the RBC⁹⁴ apply equally to machine code. Of course, if a state voluntarily legislates that converting source or object code (a protected work) into machine code is a right reserved to the author, this right should qualify for national treatment under Art. 5(1).⁹⁵

The discussion above has ignored the practical results intended to be achieved by the operation of machine code. The program may be used, for example, to present an audio-visual display such as a videogame. There seems no reason why this result should not qualify as an artistic and/or musical work expressed in a particular mode or form, despite its fluctuating and transitory character and the need for further human intervention to produce the display. The product is well within the ontological and teleological conception of artistic and musical works. The involvement of a new instrumentality, the computer, in the translation of a kinetic artistic/musical conception to the screen should be viewed simply as a technological development within the traditional arts.

91 *Supra* note 85, at 173-174.

92 Text *supra* accompanying notes 58 *et seq.*

93 RBC (Paris 1971) Arts. 2(3), 9(1). The Australian *Apple* case refused to treat machine code as such versions: *supra* note 89. The Canadian *Apple* case (*id.*) however did hold machine code a translation or reproduction in material form of source or object code under the similar Canadian Act.

94 OSTERTAG, *supra* note 38.

95 Text *infra* accompanying notes 102 *et seq.*

State practice seems to be recognizing computer programs in source, object and machine code as protectable literary works. Among the jurisdictions to do so are "copyright" countries such as the United Kingdom, Canada, Australia and South Africa,⁹⁶ as well as "authors' rights" countries such as Germany, France, Holland and Japan.⁹⁷ To the extent that these states provide national treatment for these works beyond the parameters suggested in this study, it seems that they act voluntarily and the works will be outside RBC Art. 2(1) and thus the national treatment requirements of the RBC. To the extent, however, that domestic laws grant *rights* beyond those required by the RBC to authors of works protected by Art. 2(1), these rights should fall under the national treatment requirements of RBC Art. 5(1).

No doubt, computer programs were not envisaged at the BC's inception nor during later revisions up to at least Brussels 1948. When their importance came to be appreciated, special types of protection may have been thought politically, economically or socially more desirable than a regime of author's right. But this is irrelevant to whether programs or their results fall wholly or partially under Art. 2(1) of the RBC as a matter of interpretation. This Article's language has always been kept open-ended precisely in order to embrace new sorts of work as technology, taste and ideas develop.

For continuation see next issue.

96 *United Kingdom*: the Copyright (Computer Software) Amendment Act 1985 (U.K.) now assimilates programs to literary works, a policy the U.K. government proposes to continue: DEPARTMENT OF TRADE & INDUSTRY, "Intellectual Property and Innovation" (Cmd. 9712, 1986), para. 9.3.

Canada: *Apple Computer Inc. v. Mackintosh Computers Ltd*, *supra* note 89; *I.B.M. Corp. v. Ordinateurs Spirales Inc.* 12 D.L.R. (4th) 351 (Fed. Ct., 1984); *see also supra* note 88.

Australia: Copyright Amendment Act 1984 (No. 43) includes computer software as protected work. Machine code created prior to the effective date of this amendment however has been refused copyright protection: *supra* note 89.

South Africa: *Northern Office Micro Computers (Pty) Ltd v. Rosenstein* 1981 (4) S.A.L.R. 123.

97 *Germany*: Copyright Amendment Act of June 23, 1985, equating programs with literary works: SCHROEDER, *supra* note 84.

France: the Law of July 3, 1985 (No. 85-660, Art. 1.V), clearing up prior conflicting decisions, expressly confers copyright protection on programs, prompting a commentator to suggest that the assimilation provisions of Art. 5(1) apply to them: TOUBOL, "The Protection of Computer Programs in France" [1986] E.I.P.R. 15, at 16.

Holland: KARNELL, *supra* note 78, at 132; ULMER & KOLLE, *supra* note 85, at 167, n. 24c.

Japan: Law for Partial Amendments to the Copyright Law, No. 62 of June 14, 1985, granting software copyright protection; *see* KARJALA, "Protection of Computer Programs under Japanese Copyright Law" [1986] E.I.P.R. 105, also indicating that three prior decisions had held similarly.

Bureau headed by the Director General. This also has the advantage for the Berne Union that a large efficient office is available to carry out its resolutions and tasks. The Union as such is maintained. I would like to close with the wish that in the future, in a world in which technology plays a paramount role and countries belong to different groups depending on their social and political structure, the Berne Union still adheres to its tradition and remains a uniting force for the protection of works of literature and art.

J.K.

David Vaver*

The National Treatment Requirements of the Berne and Universal Copyright Conventions

Part Two**

4. RBC Rome 1928, Art. 19: an Exception to National Treatment?

The discussion up till now has not mentioned a possible problem for states bound by RBC Berlin 1908 or Rome 1928. Under Art. 19 of those texts: "The provisions of the present convention shall not prevent a claim being made for the application of any wider provisions which may be made by the legislation of a country of the Union in favour of foreigners in general." This confusing Article, first introduced in RBC Berlin 1908, was eventually amended at Brussels 1948 by removing the final words, "in favour of foreigners in general", after an attempt to do so at Rome in 1928 failed.⁹⁸

Read literally, Art. 19 suggests that RBC members can claim rights greater than the RBC *minima* only when the other RBC forum extends such protection to "foreigners in general".⁹⁹ If the legislation simply grants greater rights

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⁹⁸ RAESTAD, *supra* note 30, at 229; LADAS, *supra* note 3, at 190 *et seq.* Some minor inconsequential drafting changes were made to Art. 19 at Stockholm 1967, principally the substitution of "greater" for "wider" before "protection".

⁹⁹ "Documents", *supra* note 45, at pp. 105, 379.